In the

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-90

SUPREME COURT, U. S.
FILED
AUG 7 1974
MICHAEL RODAK, JR., CLERK

OLIVER J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida,

Petitioner,

v.

CORDELIA DENISE MIXON, a Minor, by and through her next friend, EUNICE CARTER, and LAVERNE CRAWFORD, a/k/a LAVERNE WILLIAMS, individually and on behalf of all others similarly situated,

Respondents,

and

E. DOUGLAS ENDSLEY, Director, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida and RICHARD RUSSELL, Director, Region 2, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida and the Department of Health and Rehabilitative Services, State of Florida,

Petitioners,

v.

LEILA F. POOLE, individually, and on behalf of others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The
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OCTOBER TERM 1974

No.....

OLIVER J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida,

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CORDELIA DENISE MIXON, a Minor, by and through her next friend, EUNICE CARTER, and LAVERNE CRAWFORD, a/k/a LAVERNE WILLIAMS, individually and on behalf of all others similarly situated,

Respondents,

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

Oliver J. Keller, as Secretary of the Department of Health

and Rehabilitative Services of the State of Florida, and E. Douglas Endsley, as Director of the Division of Family Services of the Department of Health and Rehabilitative Services of the State of Florida, and Richard Russell, as Director, Region Two, of the Division of Family Services of the Department of Health and Rehabilitative Services of the State of Florida, who are hereinafter collectively referred to as the State of Florida, pray that a Writ of Certiorari issue before judgment of the United States Court of Appeals for the Fifth Circuit. The Petitioners were the Defendants in the above cited "unborn child" cases decided in the United States District Courts in the State of Florida. A Memorandum Opinion and Order was entered on February 28, 1974 and a Final Judgment was entered March 1, 1974, by the United States District Court, Middle District of Florida, Jacksonville Division, in *Mixon* v. *Keller*. An Opinion Order was entered in the United States District Court, Northern District of Florida, Tallahassee Division, on March 4, 1974 in *Poole* v. *Endsley*. The Judgment of the Court in both the *Mixon* and *Poole* cases was in favor of the State of Florida and denied the relief sought by the Plaintiffs. Both cases were subsequently appealed to the United States Court of Appeals for the Fifth Circuit where the State of Florida filed a Motion to Consolidate which was granted.

OPINIONS BELOW

The opinion of the United States District Court, Middle District of Florida, Jacksonville Division, is reported at 372 F. Supp. 51 (M.D. Fla. 1974) and is included herein as Appendix A. The opinion of the United States District Court, Northern District of Florida, Tallahassee Division, is reported at 371 F. Supp. 1379 (N.D. Fla. 1974) and is included herein as Appendix B.

Notice of Appeal was filed April 25, 1974 in *Mixon* and is included herein as Appendix C(1). Notice of Appeal was filed April 9, 1974 in *Poole* and is included herein as Appendix C(2).

The record in both cases has been docketed with the United States Court of Appeals for the Fifth Circuit. Judgment has not been rendered by said Court of Appeals.

JURISDICTION

Mixon v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), was docketed in the United States Court of Appeals for the Fifth Circuit on April 30, 1974. *Poole* v. *Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), was docketed in the United States Court of Appeals for the Fifth Circuit on April 17, 1974. Appellee, State of Florida, Motion to Consolidate the *Mixon* cause with the *Poole* cause was granted on May 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and 28 U.S.C. §2101 (e).

QUESTION PRESENTED

Does Title IV of the Social Security Act (42 U.S.C. §601, *et seq.*) require, or even authorize, fetal participation in the Aid to Families with Dependent Children program?

STATUTORY PROVISIONS INVOLVED

The Statutory and regulatory provisions involved are set forth in Appendix D aand include the following:

1. Section 406 (a) of the Social Security Act, 42 U.S.C. §606 (a)
2. 45 C.F.R. §233.90

STATEMENT OF THE CASE

This is a request for the Supreme Court of the United States to deviate from the normal appellate process and grant a Petition for a Writ of Certiorari Before Judgment to review two cases which have been consolidated and are currently pending in the United States Court of Appeals for the Fifth Circuit.

The Petitioners here represent the State of Florida and are the Appellees in the United States Court of Appeals for the Fifth Circuit. The State of Florida prevailed in the United States District Courts for both the Northern and Middle Districts of the State of Florida. The appeal to the United States Court of Appeals for the Fifth Circuit is, in each case, from an Order of a District Court which held that the Aid to Dependent Children program (AFDC) under Title IV of the Social Security Act did not mandate payment for fetuses. The *Mixon* case held that the Social Security Act is clear on its face and that the United States Department of Health, Education and Welfare (HEW) in its decision to allow options within the implementing regulations made an administrative decision which expanded the Social Security Act illegally. The *Poole* case held that an unborn child is not a child within the meaning of the Social Security Act, Title 42 U.S.C. §601 *et seq.*

Title IV of the Social Security Act provides for a state to enter into a program known as the Aid to Dependent Children program. Florida has elected to and does participate in the Aid to Dependent Children program. The Department of Health, Education and Welfare is charged with the implementation of Title IV of the Social Security Act and under said authority has promulgated regulations and interpretation of said Act. HEW,through its regulations, has construed the Social Security Act in such a manner as to *permit* payments to fetuses as an

optional element in the Aid to Dependent Children program (45 C.F.R. §233.90). As with numerous other options, the state involved must affirmatively elect said option. The State of Florida is one of thirty-five (35) jurisdictions which has not elected the "unborn child" option and submits that the HEW regulation which permits the option is without authority in Title IV of the Social Security Act. The United States District Court for the Middle District of Florida and the United States District Court for the Northern District of Florida have both held that a fetus is not a child within the meaning of Title IV of the Social Security Act.

The sole representative of the class asserted by the *Poole* case was Leila F. Poole, an unmarried nineteen-year-old woman, who was approximately nine months pregnant at the time the suit was brought. The *Mixon* suit, also filed as a class action, was brought by two representatives. Cordelia Denise Mixon, an unmarried woman, was approximately seven months pregnant at the time the suit was brought. The other named plaintiff was Laverne Crawford, also known as Laverne Williams, a married woman, who was receiving an AFDC public assistance grant for the support of a family of six at the time the suit was brought. Laverne Crawford was approximately eight months pregnant with her seventh child at the time the suit was brought. Jurisdiction in both suits was sought under 28 U.S.C. §1343 (3) (4) and 42 U.S.C. §1983. Declaratory and injunctive relief were sought against the State of Florida in both cases.

In the *Mixon* case service was had on the 20th of February, 1974 and the Court set the hearing on the Motion for Preliminary Injunction for February 27, 1974. The State of Florida filed a Motion to Dismiss, which was denied. The Court then advanced the trial of the cause on the merits and consolidated

it with the hearing on the motion for preliminary injunction. Memorandum Opinion and Order was entered on the 28th day of February and Final Judgment was entered on the 1st day of March, 1974. On March 8, 1974 a motion for a new trial was filed which was denied on March 26, 1974. On April 25, 1974, Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Fifth Circuit.

The *Poole* case was filed on the 7th day of February, 1974 and a hearing on the Motion for Temporary Restraining Order and/or Preliminary Injunction was set on the 12th of February, 1974. Argument at said hearing resulted in the Court reserving ruling and ordering counsel for both parties to file additional memoranda concerning the federal regulations and the rights of a fetus. The hearing was reconvened on February 22, 1974, at which time additional oral argument ensued. On the 4th day of March, 1974 the Court granted the Defendant's Motion for Dismissal and dismissed the cause with prejudice. On March 12, 1974 Motion for Rehearing was filed and denied. On April 9, 1974 Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the fifth Circuit.

Motion of the State of Florida to consolidate the *Mixon* and *Poole* appeals was granted on May 31, 1974 by the United States Court of Appeals for the Fifth Circuit. In both cases the record has been docketed in the United States Court of Appeals for the Fifth Circuit.

This petition for a Writ of Certiorari Before Judgment is now sought by the State of Florida.

REASONS FOR GRANTING THE WRIT

I. Importance of Issue

A. Same Issues of Law as in Other Writs Filed in This Court

It is submitted that this case involves issues of such importance as to justify deviation from normal appellate processes and the granting of a writ of certiorari to review a case pending in the Circuit Court of Appeals for the Fifth Circuit before judgment is given in such court.[1] The legal question is: Does Title IV of the Social Security Act (42 U.S.C. §601, *et seq.*) require, or even allow, fetal participation in the Aid to Families with Dependent Children program? There are currently before this Court two petitions for a writ of certiorari involving the same questions of law[2] Petitioner seeks to have reviewed by this petition for a writ of certiorari before judgment.

It is possible that this Court may reach a decision on this question prior to the State of Florida progressing through the

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1 Rule 20 of the Supreme Court of the United States Revised Rules.

2 *Alcala* v. *Burns*, 362 F. Supp. 180 (S.D. Iowa 1973), *stay granted* 414 U. S. 809, 38 L. Ed. 2d 45, 94 S. Ct. 26 (1973), *aff'd* 494 F.2d 743 (8th Cir. 1974), *petition for cert. filed*, 42 U.S.L.W. 3642, U.S. S. Ct. No. 73-1708 (May 15, 1974); *Doe* v. *Lukhard*, 363 F. Supp. 823 (E.D. Va. 1973), *aff'd* 493 F. 2d 54 (4th Cir. 1974), *petition for cert. filed* 42 U.S.L.W. 3667, U.S. S. Ct. No. 73-1763 (May 24, 1974).

normal appellate process.[3] The importance of the federal question is such that the State of Florida has an obligation to its citizens to request a hearing by this Court so that its arguments and conclusions may be presented prior to this Court reaching a decision which will bind the State of Florida. The State of Florida, unlike the State of Virginia and the State of Iowa, comes before this Court with the presumption of correctness, having been the successful litigant in three cases in two United States District Courts.[4]

This Court has traditionally reviewed cases before judgment below when a similar or identical question of constitutional or other importance was already before the Court in another case. *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 299, 70 L. Ed. 275, (1925), (cases involving bills in equity brought under the Trading with the Enemy Act); *Johnson* v. *United States Shipping Board*, 280 U.S. 320, 324-325, 75 L. Ed. 451

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3 In November of 1973 the United States Court of Appeals for the Fifth Circuit heard oral argument on two cases involving substantially the same issues of law, and to date no decision has been handed down. These cases were *Parks* v. *Harden*, 354 F. Supp. 620 (N.D. Ga. 1973), *appeal docketed*, No. 73-1855, 5th Cir., April 16, 1973; and *Harris* v. *Mississisippi State Dept. of Welfare*, 363 F. Supp. 1293 (N.D. Miss. 1973), *appeal docketed*, No. 73-3220, 5th Cir., September 18, 1973.

4 *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974; *Poole* v. *Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *appeal docketed*, No. 74-1997, 5th Cir., April 17, 1974; *Geissler* v. *Endsley*, No. 74-3 (N.D. Fla., filed March 4, 1974).

(1929), (cases involving question of whether the Suits in Admiralty Act provided exclusive remedy); *Graham and Foster* v. *Goodcell*, 282 U.S. 409, 411-412, 415 n. 2, 75 L. Ed. 415 (1930), (cases involving effect and validity of §611 in connection with §607 of the Revenue Act of 1928); *Reid* v. *Covert*, 354 U.S. 1, 5, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957), (cases involving power of Congress to expose civilians to trial by military tribunals); *Taylor* v. *McElroy*, 360 U.S. 709, 3 L. Ed. 2d 1528, 79 S. Ct. 1428 (1959), (cases involving validity of government's revocation of security clearance without confrontation and cross-examination of witness against individuals); *United States* v. *Thomas*, 361 U.S. 950, 4 L. Ed. 2d 383, 80 S. Ct. 398 (1960), (cases involving question under Civil Rights Act of 1957); *Hannah* v. *Larche*, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960), (cases involving validity of procedural rules of Federal Commission on Civil Rights); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283, 4 L. Ed. 2d 282, 80 S. Ct. 305 (1960), (cases involving application of Article 2(11) of the Uniform Code of Military Justice); *McCullough* v. *Sociedad Nacional*, 372 U.S. 10, 12, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963) (cases involving coverage of the National Labor Relations Act, as amended, 61 Stat 136, 73 Stat 541, 29 U. S. C. §§151, *et seq.*).

This Court has in the past event invited the filing of a petition for a writ of certiorari before judgment in order that issues similar to those already pending in other cases before the Court might be considered. In *Brown* v. *Board of Education*, 344 U. S. 1, 91 L. Ed. 3, 73 S. Ct. 1 (1952), this Court took judicial notice of a fourth case pending in the District of Columbia, (*Bolling* v. *Sharpe*, 344 U.S. 873, 97 L. Ed. 676, 73 S. Ct. 173 (1952), and stated that since the same issues were involved it would be well to consider the *Bolling* case with the cases involving the states of Kansas, South Carolina, and Virginia already before the Court. This Court continued the cases

already before it on appeal, and invited the filing of a petition for writ of certiorari before judgment in the *Bolling* case, in order that argument on all four cases might be heard at the same time.

B. Number of States Involved in Similar Litigation

The importance of the legal question is manifested by the fact that at the present time no less than seventeen (17) sovereign states, to wit: Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Texas and Virginia[5] are involved in various stages of litigation

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5 *Alcala* v. *Burns, supra*; *Doe* v. *Lukhard, supra*; *Green* v. *Stanton*, 364 F. Supp. 123 (N.D. Ind. 1973), *aff'd*, Nos. 73-1834, 1835 (6th Cir., filed May 9, 1974); *Wilson* v. *Weaver*, 358 F. Supp. 1147 (N.D. Ill. 1973) *aff'd*, Nos. 73-1541, 1749 (6th Cir., filed May 9, 1974); *Murrow* v. *Clifford*, Civ. No. 114-73 (D. N.J., filed June 12, 1973) *remanded* 73-1717 (3rd Cir., filed May 30, 1974); *Parks* v. *Harden, supra*; *Harris* v. *Mississippi State Dept. of Welfare, supra*; *Stuart* v. *Canary*, 367 F. Supp. 1343 (N.D. Ohio 1973); *Whitfield* v. *Minter*, 368 F. Supp. 798 (D. Mass. 1973); *Carver* v. *Hooker*, 369 F. Supp. 204 (D. N.H. 1973); *Jones* v. *Graham*, CV 73-L-235 (D. Neb., filed September 5, 1973); *Tapia* v. *Vowell*, Civ. No. 73-B-169 (S.D. Texas, filed November 14, 1973); *Wisdom* v. *Norton*, Civ. No. 15906 (D.C. Conn., filed January 3, 1974); *Mixon* v. *Keller, supra*; *Poole* v. *Endsley, supra*; *Geissler* v. *Endsley, supra*; *Taylor* v. *Hill*, C-C-74-101 (W.D. N.C., filed June 10, 1974); *Adams* v. *Huecker*, No. 7815-B (W.D. Ky., filed June 14, 1974); *Turner* v. *Shul-*

over the question which Florida requests this Court to decide on this petition for writ of certiorari before judgment. Within the seventeen states many more United States District Courts are involved in litigating the same question. The State of Florida is in the unique position of having been subject to at least one suit in all three federal districts lying within Florida.[6] It is submitted that the list of sovereign states under attack on this question will continue to grow, with diverse and conflicting opinions, until this Court decides the issue.

Because of the number of states currently involved in litigation and the extent of litigation within said states, it is submitted that this is an issue of such extraordinary national importance as to require immediate consideration and settlement in the Supreme Court of the United States. A writ of certiorari before judgment under Rule 20 will be granted by this Court upon a showing of the imperative public importance of the issues presented. *The United States of America* v. *Nixon, cert. granted,* 42 U.S.L.W. 3664, U.S. S. Ct. No. 73-1766 (May 31, 1974).

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imson, Civil Action No. 14 CV 311-W-3 (W.D. Mo., filed June 1974). Counsel is aware of the foregoing States being involved in this litigation; there are undoubtedly additional states not known to counsel.

6 *Garcia* v. *Keller,* No. 73-1751, Civ-CF (S.D. Fla., filed December 27, 1973) *dismissed as moot; Mixon* v. *Keller, supra; Poole* v. *Endsley, supra; Geissler* v. *Endsley, supra; Kremarova* v. *Endsley,* No. 74-108-CIV-CA (S.D. Fla., filed May 24, 1974) *dismissed for want of prosecution; Tillman* v. *Endsley,* Civil Action No. 73-1476-Civ.-CF (S.D. Fla.) *no decision on merits to date,* Complaint for Intervention denied October 31, 1973.

C. Construction of Act of Congress

This case involves the construction of an act of Congress and its implementing federal regulations. Under litigation is the Aid to Dependent Children program provided for by Title IV of the Social Security Act and codified in 42 U.S.C. 601, *et seq.*

The AFDC program, begun as part of the 1935 Social Security Act, provides financial assistance and social services to families with dependent children. The contention of the State of Florida, successfully advanced in two United States District Courts, is that the Social Security Act cannot be construed to include a fetus in the AFDC program without doing violence to the Act. However, regulations issued by the Department of Health, Education and Welfare implementing the Social Security Act provide for optional fetal benefits (45 C.F.R. §233.90) which the State may or may not elect within its assistance plan. The Petitioners contend that the option offered within the HEW regulations is outside the scope of HEW's authority and therefore not a legal option. Even if this Court found HEW had correctly interpreted the Social Security Act by regulation, the fact remains that HEW has expanded the Act only in terms of an option which Florida has not elected. Inconsistencies in the Respondents' position are manifested by the stand that the agency charged with the administration of the program must be looked to in determining that unborn children are eligible under the Act, but the agency interpretation must not be looked to to determine whether or not unborn children coverage is optional.

In addition there is confusion about legislative intent and history. Florida believes there are several points which have not been stressed, and in some instances have been ignored, in the lower courts.

The "proof" of legislative intent to include the fetus is provided almost entirely by quoting from material concerning Title V of the Social Security Act, *Maternal and Child Health and Crippled Children's Services.* This chapter which is to provide "services for reducing infant mortality and otherwise promoting the health of mothers and children, . . . "[7] is naturally replete with references to fetuses. As this Court is aware, Title V is separate and distinct from Title IV. An attempt to prove the coverage accorded by Title IV by quoting from Title V is as inappropriate as trying to prove the coverage of Title IV by quoting from Title VI, *Grants to States for Services to the Aged, Blind, or Disabled.*[8]

Reports and debates in both House[9] and Senate[10] committees of the last Congress are often quoted by both sides of

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7 42 U.S.C. §701 (1)

8 42 U.S.C. §801 *et seq.*

9 "Your committee wants to make clear that an unborn child would not be included in the definition of a child. This will preclude the practice now used in the AFDC program in some States, of finding that an unborn child does meet the definition, thereby establishing a 'family' even before the child is born." House Ways and Means Committee Report of H.R. 1, H.R. Rep. No. 92-231, at 184, 92d Cong.

10 "Regulations of the Department of Health, Education and Welfare *permit* Aid to Families with Dependent Children payments for a child who has not yet been born. The committee bill would make unborn children ineligible for AFDC." Senate Finance Committee Report, S. Rep. No. 92-1230, at 108, 92d Cong. (Emphasis supplied).

this controversy to reason to opposite conclusions. Congress clearly intended to force compliance with the letter of the Act and require HEW to delete fetal coverage. However, Respondents will quote the Committee Reports to indicate Congressional repudiation of the Committee reports and recommendations since the legislation dealing with Title IV was not passed. Here Florida believes the salient point to be the *reason* why the legislation was not passed. Congress ultimately decided to deal only with adult categories (Title VI, previously Title XVI, of the Social Security Act) of welfare and to make all legislative changes on Title IV at a later date.

Not to accept certiorari before judgment will allow the administration of an Act of Congress to be governed, not by the legislation itself, but by the philosophy, however benign, of the executive arm of the government charged with its implementation. The judicial branch of the government must stem the reach of the Executive when it seeks to invade the Legislative. The judicial branch of the government must also keep its own counsel and refuse to allow judicial invasion of the province of the Legislature by judicial mandate of fetal coverage when the clear intent of Congress was to the contrary.[11] The importance of these issues alone would be sufficient for this Court to review the case even if other compelling reasons did not exist.

D. Conflicts, Number of Individuals Affected, Monetary Considerations

Petitioner is aware that a conflict between the decision of

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11 Petitioner submits judicial invasion of the legislative prerogative has occured in *Alcala* v. *Burns, supra;* and *Doe* v. *Lukhard, supra.*

a court of appeals and a district court is not noted by this Court as sufficient basis alone for granting a petition for a writ of certiorari on the basis of a conflict. However, the fact that such conflicts exist does indicate the importance of the issue involved. District Courts in Florida, Georgia, New Jersey, and Kentucky[12] have ruled contrary to Circuit Courts of Appeals decisions pending review by this Court.[13] Florida, sole representative of states which prevailed at the trial level, seeks the right to review by this Court at the same time as the states which did not prevail currently petitioning for certiorari.

Other factors indicating the importance of this question of law exist. In a case of this scope millions of dollars are involved on a nationwide basis. In the State of Florida alone it is estimated the program would cost Six Million ($6,000,000) Dollars a year. Many individuals will be affected by the outcome of this litigation—the taxpayers of each state through their monetary contributions and the welfare recipients through their monetary participation. The State itself in determining funding through state legislatures, and administrative procedures, must know with a certainty the correct procedure.

Though probably not conclusive in isolation, these factors pointing to the importance of this case become increasingly impressive when viewed with the other points this Court usually considers in determining whether or not to accept a petition for a writ of certiorari before judgment.

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12 *Murrow* v. *Clifford, supra; Parks* v. *Harden, supra; Mixon* v. *Keller, supra; Poole* v. *Endsley, supra; Geissler* v. *Endsley, supra; Adams* v. *Huecker, supra.*

13 *Alcala* v. *Burns, supra; Doe* v. *Lukhard, supra.*

II. Conflicts

The State of Florida believes that there is a conflict in principle between the Supreme Court rulings in *King* v. *Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L.Ed.2d 1118 (1968); *Townsend* v. *Swank*, 404 U.S. 282, 30 L. Ed. 2d 448, 92 S. Ct. 502 (1971); *Carleson* v. *Remillard*, 406 U.S. 593, 32 L. Ed. 2d 352, 92 S. Ct. 1932 (1972) and and the decisions handed down in some United States District Courts and United States Courts of Appeal in regard to AFDC fetal coverage. In *New York State Department of Social Services* v. *Doblino*, 413 U.S. 405, 37 L. Ed. 2d 668, 93 S. Ct. 2507 (1973) this court spoke to the misinterpretations of the above cited trilogy.

In *Doblino* this court reiterated that if the plain language of an Act of Congress included an individual in coverage, he could not be excluded. This clear statement has been mutilated and the theory of "specific exclusion" is being advanced across the nation. Under color of *Townsend, King* and *Carleson* the "unborn child" suits are alleging that a fetus must be covered by the Social Security Act since unborns are not "specifically excluded" by the Act. As the district court observed in *Mixon* v. *Keller, supra* at 55, 56:

> "This construction does violence to the actual intent expressed by the Supreme Court in the above cases. The attempt to shift the burden to the defendant to prove that an item not expressly excluded is thereby included is inverted logic and will not stand. Though the Supreme Court's statements were clear in the trilogy of cases, it has been necessary for them to further explain:
>
> 'In this context, the dissenting opinion's reliance on *Townsend* v. *Swank, Carleson* v. *Remillard,* and *King* v. *Smith, supra,* is misplaced. In those cases it was clear

> that state law *excluded* people from AFDC benefits whom the Social Security Act *expressly provided* would be eligible. The court found no room either in the Act's language or legislative history to warrant the state's *additional* eligibility requirements. *New York State Department of Social Services, et al* v. *Doblino, et al* (Emphasis supplied.)" (Citations omitted)

In regard to fetal coverage, an attempt is being made to run again with the non-existent bail of "specific exclusion". It is submitted that the continued reliance upon a "theory" specifically clarified *to the contrary* by this Court makes it necessary for this Court to speak again.

There is not presently a conflict within the circuits. However, this Court has granted certiorari in cases where there have been conflicting views in the circuit courts and district courts where the question presented was important. *Calhoun* v. *Harvey*, 379 U.S. 134, 137, 13 L. 2d 190, 193, 85 S. Ct. 292 (1964). This is such a case.

CONCLUSION

Therefore, it is submitted that this Court should grant the petition for a writ of certiorari before judgment because of the important legal issues and conflicts involved which are manifested by:

A. two other sovereign states, besides Florida, currently having before this Court petitions for writs of certiorari on the same issues;

B. at least seventeen states within the Union currently litigating the same issues; and numerous United States District Courts handing down conflicting opinions;

C. the involvement of the construction and application of an Act of Congress and its implementing federal regulations which are of far reaching consequence involving hundreds of individuals personally as well as millions of dollars and the individual states' administrative systems.

Respectfully submitted,

OLIVER J. KELLER,
E. DOUGLAS ENDSLEY and
RICHARD RUSSELL, Division
of Family Services, Department
of Health and Rehabilitative
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By Counsel:

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CERTIFICATE OF SERVICE

I, Eva Dunkerley Peck, a member of the Bar of the Supreme Court of the United States and counsel for the Petitioners, Oliver J. Keller, E. Douglas Endsley, and Richard Russell, hereby certify that I have served three copies of the foregoing Petition for a Writ of Certiorari Before Judgment by depositing same in the United States Post Office, first class postage prepaid, this 2nd day of August, 1974, to Alan A. Alop, Esquire and Steven M. Goldstein, Esquire, Duval County Legal Aid Association, 816 Florida Avenue, Jacksonville, Florida, 32206, Counsel for Respondents, Cordelia Denise Mixon and Laverne Crawford, a/k/a Laverne Williams, and to Laurence Z. Shiekman, Esquire, College of Law, Florida State University, Tallahassee, Florida, 32306, Counsel for Respondent Leila F. Poole. All parties required to be served have been served.

EVA DUNKERLEY PECK

APPENDIX A

Cordelia Denise MIXON, a minor, By and Through her next friend, Eunice Carter, and Laverne Crawford, a/k/a Laverne Williams, individually and on behalf of all others similarly situated, Plaintiffs,

v.

Oliver J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida, Defendant.
No. 74-111-Civ-J-T.

United States District Court,
M. D. Florida,
Jacksonville Division.
Feb. 28, 1974.

Alan A. Mop, Steven M. Goldstein, Duval County Legal Aid Assn., Jacksonville, Fla., for plaintiffs.

Eve Dunkerley Peck, Chester G. Senf, Jacksonville, Fla., for defendant.

MEMORANDUM OPINION AND ORDER

JOHN H. WOOD, Jr., District Judge, Sitting by Designation.

On this 28th day of February, 1974, came on to be considered the above styled and numbered cause. Plaintiffs in this cause of action are in their final months of pregnancy and claim a need for pre-natal care in the form of financial benefits. They allege they are otherwise eligible for aid under the Social Security Act, but have been or would be denied assist-

ance for their unborn fetuses. Plaintiffs seek declatory and injunctive relief against the State of Florida to force the Secretary of the Department of Health and Rehabilitative Services to grant benefits under the Social Security Act, 42 U.S.C. § 601 et seq., to unborn fetuses as part and parcel of financial aid normally provided to families with dependent children (AFDC). Plaintiffs further request the Court to certify this cause as a class action. Jurisdiction is based on 42 U.S.C. § 1983, and 28 U.S.C. § 1343(3), (4) as a civil rights action and an alleged denial of equal protection under the Fourteenth Amendment to the United States Constitution. The Defendant has filed a Motion to Dismiss contending plaintiffs lack standing to bring this suit pursuant to Rule 41, F.R.Civ.P.

The Court has fully considered the memoranda of authorities relied upon by the parties, the testimony of the witnesses and the argument of counsel wherein the facts and law have been thoroughly developed in all respects.

[1] At the outset, the Court finds defendant's Motion to Dismiss should be denied. While technically the plaintiffs may not have made a formal application for AFDC benefits as contemplated under the program, the law and this Court will not require the performance of a useless act as a condition precedent for filing this suit. The evidence is clear and undisputed that the State of Florida has not elected to provide benefits to an unborn child so that the bureaucratic prerequisite of filing a formal application for such payments would indeed be an exercise in futility. The State's position as regards standing and justiciable controversy is without merit.

[2] As concerns the class action aspect of the case at Bar,

plaintiffs concede that no evidence has been presented to the Court on the matter, and accordingly the request to certify a class for the purposes of this litigation is hereby denied.

At the crux of this case is the Handbook of Public Assistance Administration, Part IV, § 3412, of the Department of Health, Education and Welfare (H. E. W.) which includes an unborn fetus under the definition of "child" where a mother's pregnancy has been medically diagnosed. H. E. W. has given the option to state welfare agencies throughout the nation to provide benefits to such "children" and as has been stated, Florida has chosen not to participate in such a program. Plaintiffs contend that the H. E. W. definition is proper in all respects, but that no option or election to provide benefits to unborn fetuses *vel non* is contemplated or permissible under the Social Security Act and that such an option violates the Equal Protection Clause of the Fourteenth Amendment. Defendants contend that the State has not violated the letter or spirit of the Act nor the regulations of the H. E. W. However, defendants allege that the H. E. W. has illegally expanded the intent of the Social Security Act to include unborn fetuses. The State of Florida also contends that the local state option is beyond the authority of H. E. W., but that Florida has not adopted these benefits and should not be required to do so.

[3] It is a well-settled principle of judicial construction that the meaning of a word or phrases used in a statute must be construed by examining the entire piece of legislation as well as its legislative history. Saxon v. Georgia Association of Independent Insurance Agents, 399 F.2d 1010 (5th Cir. 1968).

Title IV of the Social Security Act, § 401 (Codified in 42 U.S.C. § 601) establishes a cooperative Federal-State Welfare

program designed:

> "For the purpose of encouraging the care of dependent children in their own homes or in the home of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children. . . . "

The term "dependent child" is defined in 42 U.S.C. §606 (a) to mean:

> "The term 'dependent child' means a *needy child* (1) *who has been deprived of parental support or care* by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is *living* with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more such relatives as his or their own home, and (2) who is (a) under the age of eighteen, or (b) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a . . . course of vocational or technical training designed to fit him for gainful employment." (Emphasis supplied.)

[4] The plain language of the Social Security Act *appears to exclude fetuses*. It is obviously impossible to encourage the the care of a fetus in the home of a relative other than the mother.

Other portions of the Act also make sense only if the term *"child"* is limited to *born children*, not fetuses or embryos. For instance:

1. 42 U.S.C. §602(a) (7) and (8) require consideration of the child's income and resources in establishing the amount of assistance.

2. 42 U.S.C. § 602(a) (11) requires notice to law enforcement officials when the State furnishes AFDC to a "child who has been deserted or abandoned by a parent."

3. 42 U.S.C. § 602(a) (17) requires the State to attempt to establish the paternity of a child *born* out of wedlock.

[5] The Social Security Act is clear on its face and that H. E. W. in its decision to allow options within the implementing regulations has made an administrative decision which expands the Act. This was succinctly stated by the Court in Parks v. Harden, 354 F.Supp. 620 (N.D.Ga.1973), at pages 623 and 624:

> "As a matter of semantics, there simply is no way to conclude that the word 'child' includes something else which is not a 'child,' namely an unborn child. In legal terms, the unborn child is normally referred to as a fetus, or 'quick,' or *in utero* and the court knows of no cases which confer a legal right on an unborn child as such, . . . "

The plaintiffs' own expert Dr. R. Donald Garrison, a recognized authority in the field of pre-natal medicine and pediatrics, testified that fetuses are never referred to medically or clinically as children, unborn or otherwise; and that a woman is not a mother until she has produced a live child.

In normal conversational usage, "child" does not mean fetus.

Plaintiffs wish to say that "child" and "fetus" are interchangeable, which is simply not the case. A woman is not considered to *have* a child when she is carrying a fetus—she is *expecting* a child.

Certainly those members of Congress responsible for the drafting and passage of this legislation were not so naive, unversed or shortsighted in medical terminology to ignore or omit the term "fetus" where it is alleged they specifically intended to include the same. Such an omission from Title IV could only be intentional when one examines Title V of the Social Security Act where Congress specifically includes mention of pre-natal care and prospective motherhood and childbearing.

[6] Thus, under the undisputed evidence in this case, the applicant medically and legally speaking cannot be a "mother" as contemplated by the definition of "dependent child" under 42 U.S.C. § 606(a) supra, until the actual birth of the "child".

Both Houses of the 92nd Congress recognized the existing H. E. W. practice of giving an option to the State as regards the inclusion of fetuses in the AFDC program, and indicate that under the proposed family assistance program in HR–1 (Codified as P.L. 93–603) which would have applied on a uniform basis nationally, but was not adopted, that unborn children would not and should not be included.

The House Ways and Means Committee report of H.R.–1, H.R. Report No. 92–231, states, at page 184:

> "Your committee wants to make clear that an unborn child would not be included in the definition of a child. This

> will preclude the practice, now used in the AFDC program in some States, of finding that an unborn child does meet the definition, thereby establishing a 'family' even before the child is born."

The Senate Finance Committee report, Sen.Rep.No.92–1230, states at page 108:

> "Regulations of the Department of Health, Education and Welfare *permit* Aid to Families with Dependent Children payments for a child who has not yet been born. The committee bill would make *unborn* children ineligible for AFDC." (Emphasis supplied.)

Congress recognizing that H. E. W. had overstepped itself clearly meant to correct the situation. Courts generally appear unaware that the reason the legislation was not passed was because the Congress decided to deal only with the Adult Categories of Public Assistance in HR–1. (P.L. 92–603). Therefore, all references to AFDC were set aside at that time. The Committee Reports of both Houses quoted above make clear the intent of Congress to force H. E. W. to delete the optional requirement and to force compliance with the intent and plain language of the Social Security Act.

The trilogy of cases continually cited by plaintiffs in this case, [Carleson v. Remillard, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352 (1972); Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968)], do not contain rulings contrary to defendant's position. The three cases in question deal with fact situations in which the respective State has excluded individuals specifically included in the plain language

of the Social Security Act:

> "More importantly, an examination of the cases relied on reveals that the rulings were bottomed not on a variance between the state plan and the H.E.W. Regulations, but on a variance between the state's standard and the Act of Congress itself. Thus, while some reliance was placed on administrative interpretation in *King*, the ultimate holding was that Alabama's substitute parent regulation conflicted with Congress's definition of 'parent in 42 U.S.C. § 606(a) (1). Similarly, the Illinois proscription against aid to 18-20 year old college students was held to be at variance with the plain language of 42 U.S.C. § 606(a) (2) (B) in *Townsend*. Finally in *Carleson*, California's exclusion of military personnel was held to violate the definition of 'continued absence' in 42 U.S.C. § 606(a) (1). In each instance, the result came about through an ascertainable variance between the state standard and that expressed in the languageof the statute as adopted by the Congress." Parks v. Harden, supra page 623 of 354 F.Supp.

Under color of *Townsend*, *King*, and *Carleson*, plaintiffs have advanced the theory of "specific exclusion" saying that the fetus must be covered by the Social Security Act since unborns are not "specifically excluded" by the Act. This construction does violence to the actual intent expressed by the Supreme Court in the above cases. The attempt to shift the burden to the defendant to prove that an item not expressly excluded is thereby included is inverted logic and will not stand. Though the Supreme Court's statements were clear in the trilogy of cases, it has been necessary for them to further explain:

"In this context, the dissenting opinion's reliance on Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed2d 448 (1971), Carleson v. Remillard, 406 U.S. 598, 92 S.Ct. 1932, 32 L.Ed.2d 352 (1972), and King v. Smith, *supra* is misplaced. In those cases it was clear that state law *excluded* people from AFDC benefits whom the Social Security Act *expressly provided* would be eligible. The Court found no room either in the Act's language or legislative history to warrant the state's *additional* eligibility requirements." New York State Dept. of Social Services et al. v. Dublino et al., 413 U.S. 405, 421, 93 S.Ct. 2507, 2517, 37 L.Ed.2d 688, 699 (1973). (Emphasis supplied.)

This cause has been heard and ruled upon by virtue of this opinion and order. The Court is fully aware of similar litigation spawned throughout the nation. There are currently two cases under advisement in the Northern and Southern Districts of Florida. While temporary injunctive relief was granted to certain named plaintiffs, no final determination has been made as regards the class action or the merits of the legal questions similarly presented in the instant case. Therefore, this Court is not bound by any precedent within the federal district courts of Florida or the Fifth Circuit Court of Appeals.

In light of the foregoing it is the opinion and finding of the Court that any and all relief requested by plaintiffs should be and the same is hereby and in all things denied. The plaintiffs have not met their burden of showing that irreparable harm will result if AFDC aid is not awarded. Furthermore, since the Court advanced the trial of this cause on the merits and consolidated it with the hearing on the motions for preliminary injunction, this opinion and order is dispositive of all issues raised in the case and plaintiffs may seek immediate appeal or

relief from the Court of Appeals without further ado. While no evidence was presented concerning the class action aspect of this litigation and the Court had no alternative but to deny certification of a class, it nevertheless follows that a denial of relief to the named plaintiffs herein would also act as a denial to those who may be similarly situated.

APPENDIX B

Leila POOLE, Individually and on behalf of her unborn child, and on behalf of others similarly situated, Plaintiffs,

v.

E. Douglas ENDSLEY, Director, Division of Family Services, Florida Department of Health and Rehabilitative Services, et al., Defendants.

Tallahassee Civ. A. No. 74-22.

United States District Court,
N. D. Florida
March 4, 1974.

Laurence F. Shiekman and David F. Powell, Florida State University, College of Law, Tallahassee, Fla., for plaintiffs.

Eve Dunkerley Peck, Dept. of Health & Rehabilitative Services, Div. of Family Services, Jacksonville, Fla., for defendants.

OPINION-ORDER

MIDDLEBROOKS, District Judge.

PRELIMINARY STATEMENT OF ACTION

In this class action for injunctive and declaratory relief plaintiff, an unmarried, pregnant woman residing in Tallahassee, Leon County, Florida, seeks to permanently enjoin defendants from refusing to grant Aid to Families with Dependent Children (hereinafter referred to as "AFDC") program benefits to plaintiff and her unborn child and members

of the class she represents until the actual birth of the child.

It is further alleged that defendants' refusal to grant AFDC benefits to plaintiff and her unborn child and members of the class she represents has deprived and will continue to deprive them of those rights guaranteed them by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in that said refusal denies AFDC payments and medical care to unborn children and their mothers but provides such assistance to all other children and their mothers, or alternatively that the policy of refusal is in conflict with the Social Security Act, Title 42, U.S.C.A., § 601[1] and regulations

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1. "§601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children."

issued thereunder, 45 CFR, § 233.90 [2], and is therefore invalid under the Supremacy Clause of the United States Constitution.

This action was commenced under Title 42, U.S.C.A., § 1983

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2. 45 CFR, § 233.90 in pertinent part states at §§ (c)(2) and (3) that:

"(2) Federal financial participation is available in:

"(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 405(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

"(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

"(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC; and

"(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

"(3) Federal financial participation (at the 50 percent rate) is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of incapacity of a parent or pregnancy of a mother."

and jurisdiction is invoked pursuant to Title 28, U.S.C.A., §§ 1343(3) and (4), §§ 2201 and 2202, and Rules 23(a), 23(b)(2) and 57, Federal Rules of Civil Procedure. In this proceeding plaintiff seeks a preliminary and permanent injunction enjoining defendants, their successors in office, agents, employees and all other persons in active concert and participation with them from refusing to grant AFDC benefits to plaintiff and her unborn child and members of the class she represents if she and the members of said class meet all other requirements for eligibility for AFDC benefits, along with any other further relief deemed just, proper and equitable by this Court.

Having considered the affidavits, pleading and arguments of counsel for the parties in this cause, this Court makes the following findings of fact and conclusions of law as may be required by Rule 52(a), Federal Rules of Civil Procedure.

FINDING OF FACT

1. Plaintiff is an adult woman, was pregnant and due to deliver on or about February 16, 1974.

2. On January 31, 1974, plaintiff applied to the Tallahassee office of defendant, Division of Family Services, for AFDC benefits for herself and her unborn child and was denied AFDC benefits because her child had not yet been born, pursuant to the policy of the defendant, Division of Family Services, of denying such benefits until the actual birth of the unborn child.

3. Plaintiff, after the birth of her child and the subsequent establishment of eligibility would receive a medicaid backdate of eligibility of three months, which would cover the expenses

connected with the expected child, including doctor, hospital and drug bills, as well as an AFDC payment for herself and the child for the month of birth. 45 CFR, § 206.10(a)(6).[3]

4. An unborn child is not a child within the meaning of the Social Security Act, Title 42, U.S.C.A., § 601 et seq., for the above reasons and for reasons hereinafter set forth as conclusions of law.

CONCLUSIONS OF LAW

[1] 1. This Court recognizes that in 1962, the now Section 601 of the Social Security Act was amended by substituting "aid and services to needy families with children" in place of the phrase "aid to dependent children" which might indicate that the aid to be rendered was intended for "families" and not exclusively for "dependent children". Though this may well be the case there remains an absence of intent to include unborns within the definition of "dependent children". Pub.L. 87–543.

2. In order to properly determine whether "unborn children" are "dependent children" under Section 601 of the Act it

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[3] 45 CFR, § 206.10(a)(6) states that:

"Entitlement will begin as specified in the State plan, which (i) for financial assistance must be no later than the date of authorization for payment and, for purposes of federal financial participation, may be as early as the first of the month in which an application has been received and the individual meets all the eligibility conditions, and (ii) for medical assistance must be no later than the date of application for either financial or medical assistance, and may be as early as the third month prior to the month of application if the individual was eligible in that month."

is necessary to scan the pages of history and the development of the law as regards the definition of "child" or "children". Title 42, U.S.C.A., § 601.

There exists substantial authority developed in recent years that rights are created in an unborn child once the fetus becomes "viable". Viability is usually placed at about seven months but may occur as early as 24 weeks. See Roe v. Wade, 410 U.S. 113, 159–162, 93 S.Ct. 755, 35 L.Ed.2d 147 (1973). However, most of this authority creating rights in the unborn came into being since the enactment of Section 601 of the Social Security Act. Until recent years in areas other than criminal abortion, however, the law has been reluctant to endorse any theory that life exists prior to live birth. No legal rights were created or authorized the unborn except in narrowly defined situations and even then rights were contingent upon live birth. To put it in simple terms the unborn are not generally recognized as persons. See Roe v. Wade, supra, at pages 161–162, 93 S.Ct. at page 755.

THE SECTION 1983 CLAIM

[2] 3. This action is based in part on alleged deprivation of rights guaranteed by Title 42, U.S.C.A., § 1983, which provides:

"§ 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

> thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This section, of course, provides for liability for deprivation of rights or privileges secured by the Constitution of the United States.

Roe v. Wade, supra, persuades this Court that an unborn child is not included among persons who are entitled to relief under this Act. The Court states at page 158:

> "All this . . . persuades us that the word 'person', as used in the Fourteenth Amendment, does not include the unborn . . ."

It necessarily follows that if an unborn is not a person under the Fourteenth Amendment an unborn has no right of action under Section 1983 and this claim must fall.

THE FOURTEENTH AMENDMENT CLAIM

[3] 4. The law is clear that an unborn child is not a person under the Fourteenth Amendment of the United States Constitution and therefore the unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privleges secured by the Amendment. Roe v. Wade, supra, at page 158, 93 S.Ct. at page 755.

THE PURPOSE OF THE ACT PROVIDING FOR AFDC

5. It is interesting to note that the initials AFDC refer to

Aid for Dependent Children. It appears fairly obvious that the Congressional concern was for children. In order for this Court to find that the regulation, 45 CFR, Section 233.90(c)(2)(ii) is a valid expression of Congressional interest this Court must find from the statute itself or from legislative history that Congress contemplated payments of federal funds to supplement state funds for the benefit of unborn children at the time the statute was enacted or in subsequent amendments to the Act. This Court cannot find such intent from any Congressional actions as might affect that section of the statutes providing for aid to dependent children. For a discussion of the legislative history see Parks v. Harden, D.C.Ga., 354 F.Supp. 620, 624.

The regulation providing for aid to unborn children provides that benefits are available "when the fact of pregnancy [of the mother] has been determined by medical diagnosis".[4] According to medical authorities this can be determined at least by the third month of pregnancy. Can it be said that Congress at the time this legislation was enacted in the year 1936, intended to provide benefits in the Act for an undeveloped fetus in the early months of pregnancy? The answer is obvious.

It is interesting to note that the regulation in question providing for aid for the benefit of dependent children is silent as to the meaning of the words "unborn child".

[4] 6. Since the administrative agency regulation, if valid, is merely a statement of areas of availability for federal financial participation and not a mandatory requirement placed on those states participating in the AFDC program, there is no head-on collision between federal and state authority requir-

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4. See footnote 2, supra.

ing a conclusion that the state policy violates the Supremacy Clause.

7. Though obviously not determinative of the action of this Court in the disposition of the issues in this cause, this Court would reflect on the consequences of a judgment in favor of plaintiffs upon the fiscal policies and the state treasury of Florida.

The regulations promulgated by the administrative agency with reference to the pertinent portion of the *statutory provision* involved here enable a participating state to elect whether to provide benefits for the unborn. In fact a perusal of the regulations as a whole would show that in other areas in which federal funds are provided the states may elect to refrain from participating.

As will be seen in Parks v. Harden, supra, at least 40 states have not elected to provide benefits under the state program for the unborn. This fact has long been recognized by Congress and Congress has not elected to act to *require* that states provide benefits in favor of the unborn.

It should also be noted that Florida *does* provide Medicaid benefits which cover doctor, hospital and drug expenses incurred during the third trimester of pregnancy upon application under Title 45, CFR, Section 206.10(a)(6)(ii).

It appears reasonable to this Court that Congressional policy did not dictate that the state treasuries be burdened with payments in cases as are before this Court when during the entire history of the Act no funds have been appropriated for this purpose and Congress has not indicated any intent to require states

to participate in a program for payment of benefits in behalf of an unborn child. Accordingly, it is

Ordered that defendants' motion for dismissal be granted on the ground that upon the facts and the law in this case plaintiff has shown no right to relief and this cause is hereby dismissed with prejudice.

APPENDIX C(1)

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CORDELIA DENISE MIXON, a minor, by and through her next friend, EUNICE CARTER, and LAVERN CRAWFORD, a/k/a LAVERN WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs,

—vs—

OLIVER J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida,

Defendant.

Filed Apr. 24, 1974, Jacksonville, Fla.

NO. 74-111-Civ-J-T

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs in the above-styled action hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 1st day of March, 1974, and the Order entered March 26, 1974, denying plaintiffs' Motion for a new trial.

This action was permitted to proceed in forma pauperis by order of this Court dated February 20, 1974. Pursuant to Federal Rules of Appellate Procedure, Rule 24(a), this appeal is filed in forma pauperis.

/s/ Alan A. Alop
ALAN A. ALOP, ESQUIRE
STEVEN M. GOLDSTEIN, ESQUIRE
Attorneys for Plaintiffs
Duval County Legal Aid Assoc.
816 Florida Avenue
Jacksonville, Florida 32206

APPENDIX C (2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

CASE NO. TCA 74-22

LEILA POOLE, Individually and
on behalf of her unborn child,
and on behalf of others similarly
situated,

Plaintiffs,

vs.
E. DOUGLAS ENDSLEY, Director,
Division of Family Services,
Florida Department of Health
and Rehabilitative Services, and
RICHARD RUSSELL, Director, Region
2, Division of Family Services,
Florida Department of Health
and Rehabilitative Services,
and the FLORIDA DEPARTMENT
OF HEALTH AND REHABILITATIVE
SERVICES.

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Lelia Poole, PLAINTIFF above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order Denying Plaintiff's Motion for Rehearing on the 12th day of March, 1974, and from the District Court's Order of March 4, 1974, denying Plaintiff's Mo-

tion for Preliminary Injunction and dismissing the above-captioned case with prejudice.

This good faith appeal is taken *in forma pauperis* pursuant to Rule 24(a) (¶ 2) of the Federal Rules of Appellate Procedure as the District Order has previously granted leave to proceed *in forma pauperis* on February 11, 1974.

Respectively submitted,

/s/ Laurence Shiekman

LAURENCE SHIEKMAN
DAVID POWELL
Attorneys for Plaintiffs
2731 Blairstone Road, #36
Tallahassee, Florida 32301
904/877-1739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true copy of the foregoing Notice of Appeal was furnished by U.S. Mail to EVE PECK, ESQ., Division of Family Services, Post Office Box 2050, Jacksonville, Florida 32203, Attorney for Defendants, this 9th day of April, 1974.

/s/ Laurence Shiekman

LAURENCE SHIEKMAN
Counsel for Plaintiffs

APPENDIX D (1)

42 § 606, Public Health And Welfare, Ch. 7
§ 606. Definitions

When used in this part–

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece in a place of residence maintained by one or more of such relatives as his or their own home and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

APPENDIX D (2)

(45 C.F.R. 233.90)

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

(b) *Conditions for plan approval.*

(1) A child may not be denied AFDC either initially or subsequently "because of the conditions of the home in which the child resides," or because the home is considered "unsuit-

able," unless "provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child." (Section 404(b) of the Social Security Act.)

(2) An otherwise eligible child who is under the age of 18 years may not be denied AFDC, regardless of whether he attends school or makes satisfactory grades.

(3) If a State elects to include in its AFDC program children 18 and over, it must include all children 18 years of age and under 21 who are students regularly attending a school, college, or university, or a course of vocational or technical training designed to fit them for gainful employment.

(c) *Federal financial participation.* (1) Federal financial participation under title IV-A of the Social Security Act in payments with respect to a "dependent child," as defined in section 406(a) of the Act, is available within the following interpretations:

(i) *Needy child deprived by reason of.* The phrase, "needy child * * * deprived * * * by reason of" requires that both need and deprivation of parental support or care exist in the individual case but does not require an affirmative showing that a causal relationship exists in the individual case. The phrase encompasses the situation of any child who is in need and otherwise eligible, and whose parent—father or mother—either has died, has a physical or mental incapacity, or is continually absent from the home. This interpretation is equally applicable whether the parent was the chief bread winner or devoted himself or herself primarily to the care of the child, and whether or not the parents were married to each other. The determination whether a child has been deprived of parental support or care is made in relation to the child's natural parent or, as appropriate, the adoptive parent or stepparent described in paragraph (a) of this section.

(ii) *Death of a parent.* If either parent of a child is deceased, the child is deprived of parental support or care, and may, if he is in need and otherwise eligible, be included within the scope of the program.

(iii) *Continued absence of the parent from the home.* Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these conditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously.

(iv) *"Physical or mental incapacity."* "Physical or menta incapacity" of a parent may be deemed to exist when tal incapacity" of a parent may be deemed to exist when ability, whatever its cause, degree, or duration, or accompanying factors.

(v) *"Living with [a specified relative] in a place of residence maintained *** as his *** own home."* (a) A child may be considered to meet the requirement of living with one of the relatives specified in the Act if his home is with a parent or a person in one of the following groups:

(1) Any blood relative, including those of half-blood, and including first cousins, nephews, or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great;

(2) Stepfather, stepmother, stepbrother, and stepsister.

(3) Persons who legally adopt a child or his parent as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with State law.

(4) Spouses of any persons named in the above groups even after the marriage is terminated by death or divorce.

(b) A home is the family setting maintained or in process of being established, as evidenced by assumption and continuation of responsibility for day to day care of the child by the relative with whom the child is living. A home exists so long as the relative exercises responsibility for the care and control of the child, even though either the child or the relative is temporarily absent from the customary family setting. Within this interpretation, the child is considered to be "living with" his relative even though

(1) He is under the jurisdiction of the court (e.g., receiving probation services or protective supervision); or

(2) Legal custody is held by an agency that does not have physical possession of the child.

(vi) *"Student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."* A child may be considered a student regularly attending a school or a training course:

(A) If he is enrolled in and physically attending a full-time (as certified by the school or institute attended) program of study or training leading to a certificate, diploma or degree; or

(B) If he is enrolled in and physically attending at least half-time (as certified by the school or institute attended) a program of study or training leading to a certificate, diploma or degree and is regularly employed in or available for and actively seeking part-time employment; or

(C) If he is enrolled in and physically attending at least half-time (as certified by the school or institute attended) a program of study or training leading to a certificate, diploma or degree and is precluded from full-time attendance or part-time employment because of a verified physical handicap. Under this interpretation;

(D) Full-time and half-time attendance are defined, as set forth in Veterans Administration requirements:

(1) In a trade or technical school, in a program involving shop practice, full-time is 30 clock hours per week and half-time is 15 clock hours; in a program without shop practice, full-time is 25 clock hours and half-time is 12 clock hours;

(2) In a college or university, full-time is 12 semester or quarter hours and half-time is 8 semester or quarter hours;

(3) In a secondary school, full-time is 25 clock hours per week or 4 Carnegie units per year and half-time is 12 clock hours or 2 Carnegie units;

(4) In a secondary education program of cooperative training or in apprenticeship training, full-time attendance is as defined by State regulation or policy; and

(E) A child shall be considered in regular attendance in months in which he is not attending because of official school or training program vacation, illness, convalescence, or family emergency, and for the month in which he completes or discontinues his school or training program.

(2) Federal financial participation is available in:

(i) Initial payments made on behalf of a child who goes to live with a relative specified in section 406(a)(1) of the Social Security Act within 30 days of the receipt of the first payment, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC;

(ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;

(iii) Payments made for the entire month in the course of which a child leaves the home of a specified relative, provided payments are not made for a concurrent period for the same child in the home of another relative or as AFDC-FC; and

(iv) Payments made to persons acting for relatives specified in section 406(a)(1) of the Act in emergency situations that deprive the child of the care of the relative through whom he has been receiving aid, for a temporary period necessary to make and carry out plans for the child's continuing care and support.

(3) Federal financial participation (at the 50 percent rate) is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of incapacity of a parent or pregnancy of a mother.

Supreme Court of the United States

OCTOBER TERM, 1974

NOV 7 1974
MICHAEL RODAK, JR., CLERK

No. 74-90

OLIVER J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida,
Petitioner,

v.

CORDELIA DENISE MIXON, a Minor, by and through her next friend, EUNICE CARTER, and LAVERNE CRAWFORD, a/k/a LAVERNE WILLIAMS, individually and on behalf of all others similarly situated,
Respondents,

and

E. DOUGLAS ENDSLEY, Director, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida, and RICHARD RUSSELL, Director, Region 2, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida and the Department of Health and Rehabilitative Services, State of Florida,
Petitioners,

v.

LEILA F. POOLE, individually, and on behalf of others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

CHESTER G. SENF
General Counsel

EVA DUNKERLEY PECK
Counsel of Record

Division of Family Services, Department of Health and Rehabilitative Services, State of Florida
P.O. Box 2050, Jacksonville, Florida 32203

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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-90

OLIVER J. KELLER, Secretary, Department of Health and Rehabilitative Services, State of Florida,
Petitioner,

v.

CORDELIA DENISE MIXON, a Minor, by and through her next friend, EUNICE CARTER, and LAVERNE CRAWFORD, a/k/a LAVERNE WILLIAMS, individually and on behalf of all others similarly situated,
Respondents,

and

E. DOUGLAS ENDSLEY, Director, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida, and RICHARD RUSSELL, Director, Region 2, Division of Family Services, Department of Health and Rehabilitative Services, State of Florida and the Department of Health and Rehabilitative Services, State of Florida,
Petitioners,

v.

LEILA F. POOLE, individually, and on behalf of others similarly situated,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari

before Judgment, entered on October 15, 1974, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

THE GRANT OF CERTIORARI IN ALCALA v. BURNS, U.S. S.CT. NO. 73-1708

An intervening circumstance of substantial and controlling effect occurred after the denial by this Court of the Petition for a Writ of Certiorari Before Judgment filed by the State of Florida; to-wit: On October 15, 1974, this Court granted Certiorari in *Alcala* v. *Burns*.[1]

The legal question which *both* the State of Iowa and the State of Florida seek to have resolved by this Court is: Does Title IV of the Social Security Act (42 U.S.C. § 601, *et seq.*), require, or even allow, fetal participation in the Aid to Families with Dependent Children program? Despite the fact that the identical question is raised, the Petition for Certiorari filed by the State of Florida was denied and the Petition for Certiorari filed by the State of Iowa was granted. Since this Court handed down both Orders on the same day, the dissimilar action taken by this Court, on what should be companion cases, may not have come to the attention of this Court. This Court has granted Rehearings in the past when the same or related issues have come before this Court in another case still pending.

The State of Florida sought Certiorari under Rule 20 of

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1 *Alcala* v. *Burns*, 362 F. Supp. 180 (S.D. Iowa 1973), *stay granted* 414 U.S. 809, 38 L. Ed. 2d 45, 94 S. Ct. 26 (1973), *aff'd* 494 F. 2d 743 (8th Cir. 1974); *petition for cert. granted*, 43 U.S.L.W. 3208, U.S. S. Ct. No. 73-1708 (Oct. 15, 1974).

the Supreme Court of the United States Revised Rules, which allows the grant of a Writ of Certiorari to review a case pending in a Circuit Court of Appeals prior to Judgment of said Court of Appeals. It is submitted that Rule 20 was adopted by this Court for just such an extraordinary situation as the one at bar. Not only does this case involve issues of such importance as to justify deviation from normal appellate processes, but this case could join and be consolidated with the *Alcala* case now before this Court which presents the identical question of law. This Court in the past has traditionally reviewed cases before Judgment below when a similar or identical question of constitutional or other importance was already before the Court in another case.[2]

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2 *White* v. *Mechanics Securities Corp.*, 269 U.S. 283, 299, 70 L. Ed. 275, (1925), (cases involving bills in equity brought under the Trading with the Enemy Act); *Johnson* v. *United States Shipping Board*, 280 U.S. 320, 324-325, 75 L. Ed. 451 (1929), (cases involving question of whether the Suits in Admiralty Act provided exclusive remedy); *Graham and Foster* v. *Goodcell*, 282 U.S. 409, 411-412, 415 n. 2, 75 L. Ed. 415 (1930), (cases involving effect and validity of §611 in connection with §607 of the Revenue Act of 1928); *Reid* v. *Covert*, 354 U.S. 1, 5, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957), (cases involving power of Congress to expose civilians to trial by military tribunals); *Taylor* v. *McElroy*, 360 U.S. 709, 3 L. Ed. 2d 1528, 79 S. Ct. 1428 (1959), (cases involving validity of government's revocation of security clearance without confrontation and cross-examination of witness against individuals); *United States* v. *Thomas*, 361 U.S. 950, 4 L. Ed. 2d 383, 80 S. Ct. 398 (1960), (cases involving question under Civil Rights Act of 1957); *Hannah* v. *Larche*, 363 U.S. 420, 4 L. Ed. 2d 1307, 80 S. Ct. 1502 (1960), (cases involving validity of procedural rules of Federal Commission on Civil Rights); *McElroy* v. *Guagliardo*, 361 U.S. 281, 283,

However, there are substantial and unique differences in the Florida and the Iowa cases which merit this Court's attention and consideration being given to *both* cases. (1) The State of Florida, unlike the State of Iowa, would come before this Court with the presumption of correctness, having been the successful litigant in two United States District Courts.[3] (2) The legal argument advanced by the State of Florida is unique in that it directly challenges the authority of the Department of Health, Education and Welfare to promulgate regulations wholly outside the clear meaning and intent of the enabling Statutes. This position is buttressed by the plain language of the Social Security Act, the legislative history, and United States Supreme Court decisions. The United States District Courts in the Northern District of Florida and the Middle District of Florida, both held that the Social Security Act did not make provision for fetal participation in the Aid to Families with Dependent Children program and that the implementing regulations promulgated

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4 L. Ed. 2d 282, 80 S. Ct. 305 (1960), (cases involving application of Article 2(11) of the Uniform Code of Military Justice); *McCullough* v. *Sociedad Nacional*, 372 U.S. 10, 12, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963) (cases involving coverage of the National Labor Relations Act, as amended, 61 Stat 136, 73 Stat 541, 29 U.S.C. §§151, *et seq.*).

3 *Mixon* v. *Keller*, 372 F. Supp. 51 (M.D. Fla. 1974), *appeal docketed*, No. 74-2119, 5th Cir., April 30, 1974, *cert. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974); *Poole* v. *Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *appeal docketed*, No. 74-1997, 5th Cir., April 17, 1974, *cert. denied*, 43 U.S.L.W. 3213, U.S. S. Ct. No. 74-90 (Oct. 15, 1974); *Geissler* v. *Endsley*, No. 74-3 (N.D. Fla., filed March 4, 1974).

by the Department of Health, Education and Welfare, which allow fetal benefits at the option of the State, are illegal.[4]

In *Alcala*, the Eighth Circuit reasoned from the HEW regulations back to the Social Security Act, instead of from the Social Security Act forward to the HEW regulations. Therefore, by granting Certiorari to Florida, this Court will have the benefit of Florida's argument of legal theories substantially different in kind and degree from theories advanced by other states. And, the citizens of the State of Florida will have the opportunity of presenting their case in Court prior to this Court handing down a decision which will be of far reaching consequence involving hundreds of individuals personally as well as millions of dollars, and the State's administrative system.

CONFLICT IN CIRCUITS

A conflict in the circuit courts of appeals has arisen since Florida submitted the Petition for a Writ of Certiorari before Judgment. On October 11, 1974, the United States Court of Appeals for the Second Circuit ruled that Title IV of the Social Security Act does *not* permit or authorize fetal coverage in the Aid to Dependent Children program. *Wisdom* v. *Norton*, 372 F. Supp. 1190 (D. Conn. 1974), *rev'd*, No. 1058, Sept. Term 1973 (2nd Cir., filed October 11, 1974).

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4 *Mixon* v. *Keller, supra; Poole* v. *Endsley, supra; Geissler* v. *Endsley, supra.*

CONCLUSION

The State of Iowa has been requested by this Court to follow an expedited schedule in submitting its Brief on the merits with same being delivered to this Court by the 19th of November, 1974. With this schedule in mind, the State of Florida respectfully requests action on this Petition for Rehearing as soon as possible.

For the reasons set forth above, as well as those contained in the Petition for a Writ of Certiorari before Judgment, Petitioner prays that this Court grant Rehearing of the Order of Denial, vacate that Order, and grant the Petition for a Writ of Certiorari before Judgment.

Respectfully submitted,

OLIVER J. KELLER,
E. DOUGLAS ENDSLEY and
RICHARD RUSSELL, Division
of Family Services, Department
of Health and Rehabilitative
Services, State of Florida

By Counsel:

CHESTER G. SENF
General Counsel

EVA DUNKERLEY PECK
Counsel of Record

Division of Family Services, Department of Health and Rehabilitative Services, State of Florida

P.O. Box 2050, Jacksonville, Florida 32203

CERTIFICATE OF COUNSEL

As Counsel for the Petitioners, I hereby certify that this PETITION FOR REHEARING is presented in good faith and not for delay and is restricted to the grounds set forth as appropriate for the grant of Rehearings under Rule 58 (2) of the Supreme Court of the United States Revised Rules.

EVA DUNKERLEY PECK
Counsel of Record

CERTIFICATE OF SERVICE

I, EVA DUNKERLEY PECK, a Member of the Bar of the Supreme Court of the United States and Counsel for the Petitioners, Oliver J. Keller, E. Douglas Endsley, and Richard Russell, hereby certify that I have served three copies of the foregoing PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT by depositing the same in the United States Post Office, first class postage prepaid, this 6th day of November, A. D. 1974, to PAUL C. DOYLE, Esquire, Duval County Legal Aid Association, 816 Florida Avenue, Jacksonville, Florida 32206, Counsel for Respondents Cordelia Denise Mixon and Laverne Crawford, a/k/a Laverne Williams, and to LAWRENCE Z. SHIEKMAN, Esquire, College of Law, Florida State University, Tallahassee, Florida 32306, Counsel for Respondent Leila F. Poole. All parties required to be served have been served.

EVA DUNKERLEY PECK